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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

LIGGETT GROUP INC. and
LIGGETT & MYERS TOBACCO CO., INC.,
Petitioners,

—v.—

PUBLIC CITIZEN,
THE AMERICAN CANCER SOCIETY,
THE AMERICAN HEART ASSOCIATION,
THE AMERICAN LUNG ASSOCIATION and
THE AMERICAN PUBLIC HEALTH ASSOCIATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

DONALD J. COHN
(Counsel of Record)
WEBSTER & SHEFFIELD
237 Park Avenue
New York, New York 10017
(212) 808-6000

JOSIAH S. MURRAY, III
LIGGETT GROUP INC.
300 North Duke Street
Durham, North Carolina 27702
(919) 683-9000

Of Counsel:
LAWRENCE D. GERZOG

(Additional Counsel Listed on Inside Cover)

25pp

Of Counsel:
JOSEPH J. LEGHORN

SAMUEL ADAMS
WARNER & STACKPOLE
75 State Street
Boston, Massachusetts 02109
(617) 951-9000

Attorneys for Petitioners

QUESTION PRESENTED

Where a proteetive order was concededly valid when entered and reaffirmed, the case has been dismissed and the time to appeal has expired, do the Federal Rules of Civil Procedure implicitly create a substantive right which enables persons not parties to the case to obtain access to private discovery material which was not used in the adjudication of the case, and which such persons intend to use for purposes totally unrelated to the case?

PARTIES BELOW

This petition seeks review of a decision by the United States Court of Appeals for the First Circuit entitled *Public Citizen et al. v. Liggett Group Inc. et al.*, 858 F.2d 775 (1st Cir. 1988). The parties appearing in the United States Court of Appeals for the First Circuit were Public Citizen, American Cancer Society, American Heart Association, American Lung Association and American Public Health Association, who appeared as non-party movants-appellees (collectively, "Non-Party Movants") and Liggett Group Inc. and Liggett & Myers Tobacco Co., Inc. (collectively, "Liggett"), who appeared as defendants-appellants.[1] The controversy here arises in connection with discovery produced in *Ann M. Palmer et al. v. Liggett Group Inc. et al.*, Civil Action No. 83-2445-MA, United States District Court for the District of Massachusetts. Plaintiffs in that action took no part in the proceedings at issue here at the Court of Appeals level. Conversely, the Non-Party Movants in the proceedings at issue were not parties in the *Palmer* case.

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[1] As required by Supreme Court Rules 21.1 and 28.1, the following is a listing of the parents, subsidiaries (except wholly owned subsidiaries) and affiliates of petitioner Liggett Group Inc.: B. S. LeBow Inc., L. Holdings Inc., Liggett & Myers Tobacco Co. of Canada Limited, United States Gold Co., South Dakota Gold Company Inc. and Sarah Coventry, Inc. Petitioner Liggett & Myers Tobacco Co., Inc., is a wholly owned subsidiary of petitioner Liggett Group Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners Liggett Group Inc. and Liggett & Myers Tobacco Co., Inc., respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on September 28, 1988.

OPINIONS BELOW

The protective order at issue here was entered by the District Court on February 25, 1985. [M-1].[2]

[2] Numbers in brackets refer to pages of the Appendix to this petition.

The orders of the District Court affirming the continuing validity of the February 25 Order were entered on July 16, 1985 [K-1; L-1], July 19, 1985 [J-1], and August 12, 1985. [H-1; I-1].

The order of the District Court modifying the February 25 Order was entered on January 28, 1988. [E-1].

The opinion of the Court of Appeals for the First Circuit affirming in part and reversing in part was issued on September 28, 1988 [A-1] and is published at 858 F.2d 775 (1st Cir. 1988).

JURISDICTION

The opinion of the Court of Appeals for the First Circuit was entered on September 28, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

This petition concerns Rules 1 and 26(c) of the Federal Rules of Civil Procedure. Rule 1 provides:

> These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 26(c) provides:

> **Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the

discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

STATEMENT OF THE CASE

Certain crucial points involved in this petition are not in dispute. The protective order entered in the District Court on February 25, 1985 (hereinafter the "February 25 Order"), the post-judgment modification of which is the subject of this petition, was a valid protective order at the time it was entered. The Non-Party Movants conceded that such protective order was valid, and the First Circuit assumed its validity. [A-12]. This case was dismissed as a matter of law. The discovery material covered by this protective order, to which the Non-Party Movants seek access, played no role whatsoever in the dismissal of the action. The Non-Party Movants assert no common law or First Amendment rights which enable them to obtain the discovery material. They claim access to the discovery material for purposes unrelated to the case solely on the basis of the Federal Rules of Civil Procedure.

The decision of the First Circuit violates the most basic policies of the Rules of Civil Procedure, fails to follow this Court's opinion in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), and will have far-reaching and dire consequences for the fair and equitable application of discovery rules throughout the country.

The District Court's Protective Orders

During the pendency of *Palmer*, both plaintiffs and Liggett had obtained protective orders preventing public dissemination of discovery materials. The February 25 Order, which covered information produced by plaintiffs and non-party witnesses as well as by Liggett, provided in Paragraph 2 that "[a]ll information produced or exchanged in the course of this civil action . . . shall be used solely for the purpose of this case." [M-1]. Paragraph 13 of the order stated that within 45 days of "the final adjudication or settlement of all claims in this case, counsel for the parties either shall return all documents produced, if so requested by the producing party, or shall destroy all such documents." [M-5]. The order gave a further level of protection to any information that the parties might specifically designate as "confidential."

In the course of discovery, plaintiffs served two sets of interrogatories on Liggett and deposed two individual officers of Liggett. Plaintiffs also subpoenaed documents from non-party Arthur D. Little, Inc. ("ADL"), a private consulting organization that had performed research work for Liggett beginning in the early 1950s. Among other materials, Liggett obtained the medical and psychiatric records of the plaintiffs' decedent during discovery.

On several occasions during the lawsuit, the February 25 Order was challenged, but was reaffirmed each time by the District Court. In June 1985 plaintiffs filed a "Notice of Intent to Disseminate Documents" to Dow Jones & Company, Inc. ("Dow Jones"), publishers of *The Wall Street Journal*, thereby necessitating a motion by Liggett to compel plaintiffs'

compliance with the February 25 Order. [L-1]. The District Court granted Liggett's motion. [L-4]. In July 1985, Dow Jones sought leave to intervene to seek modification of the February 25 Order in order to obtain access to the ADL documents. That motion was denied. [J-3].

On July 23, 1985, Dow Jones moved for reconsideration of the prior motion to intervene in light of a decision modifying a protective order handed down by the United States District Court in *Cipollone v. Liggett Group Inc.*, 106 F.R.D. 573 (D.N.J. 1985). On August 12, 1985, the District Court denied Dow Jones's motion for reconsideration, but stated that the motion could be renewed following the decision of the Third Circuit on defendants' mandamus petition in *Cipollone*. Dow Jones never renewed its motion.

The Dismissal of the Lawsuit

On April 8, 1986, Liggett moved to dismiss certain of plaintiffs' statutory and common law claims on the ground that such claims were preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §1331 *et seq.* (the "Act"). The District Court denied Liggett's motion, but certified the issue for appeal. Liggett then appealed to the First Circuit. Certain of the Non-Party Movants appeared as *amici* in support of affirmance.

On August 25, 1987, the First Circuit handed down its opinion in *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987), reversing the District Court and holding that plaintiffs' claims were preempted by the Act. [B-1]. The case was remanded to the District Court. Liggett then renewed its motion to dismiss on the ground that, under the First Circuit's decision, each of the claims in plaintiffs' complaint was preempted. Plaintiffs opposed the renewed motion to dismiss on the ground that certain claims remained outstanding in their complaint. On October 6, 1987, the District Court granted Liggett's motion and dismissed *Palmer* in its entirety. [G-1]. On the following day, October 7, 1987, final judgment was entered in favor of Liggett. [C-1].

The February 25 Order remained in effect at the time of final judgment. The discovery materials at issue here played no role in the dismissal.

Following dismissal of the *Palmer* action, pursuant to Paragraph 13 of the February 25 Order, Liggett and ADL requested that plaintiffs' counsel return all discovery materials to the producing parties. Plaintiffs took no appeal from the dismissal of their action and time to appeal expired on November 6, 1987.

The Motion by the Non-Party Movants

On December 28, 1987, almost three months after final judgment — and one-and-half months after the time for all appeals had run — the Non-Party Movants filed a motion to vacate the protective orders that had been entered in the action, including the February 25 Order, and to require the filing of all discovery material with the court pursuant to Rule 5(d) of the Federal Rules of Civil Procedure so that the public could have access to it. [E-1].

The Non-Party Movants' motive in seeking the pre-trial discovery materials produced in *Palmer* had nothing to do with the substance of the litigation. Rather, their reason was to use the materials to advance their own interests in "educating" the public according to their own views, and to make the materials available to members of Congress.

The District Court granted the Non-Party Movants' motion. [E-1]. At Liggett's request, the District Court stayed enforcement of the Order pending the results of Liggett's appeal to the First Circuit.

The Decision in the Court of Appeals

Petitioners appealed the order of the District Court to the First Circuit, which reversed the order in so far as it required the filing of discovery materials in court under Rule 5(d), but affirmed the District Court's lifting of the February 25 Order.

The First Circuit held that Rule 26(c)'s good cause requirement implicitly or presumptively makes all discovery materials public in the absence of a protective order. Even though the February 25 Order was valid when entered, the First Circuit concluded that the dismissal of the case as a matter of law constituted a sufficient change in circumstances to justify modification of the protective order. The parties were authorized to disseminate private discovery material to anybody for any use whatsoever. [A-31].

REASONS FOR GRANTING THE WRIT

BY CREATING A BROAD RIGHT OF PUBLIC ACCESS TO PRIVATE DISCOVERY MATERIALS WHICH HAVE PLAYED NO ROLE IN THE ADJUDICATION OF A PROCEEDING, THE DECISION BELOW VIOLATES THE PURPOSE AND INTENT OF THE FEDERAL RULES OF CIVIL PROCEDURE AS INTERPRETED BY THIS COURT IN *SEATTLE TIMES* AND WILL BURDEN THE FEDERAL COURTS WITH A SUBSTANTIAL INCREASE IN DISCOVERY DISPUTES AND PROTECTIVE ORDER LITIGATION

The important national issue raised by this petition is whether materials produced in discovery under the Federal Rules of Civil Procedure are presumptively non-public, and are to be used solely in the litigation, or whether they are presumptively public, allowing litigants to make discovery material freely available for any purpose whether or not related to the litigation in which they were produced. The First and Second Circuits have ruled that the good cause requirement of Rule 26(c) makes discovery material presumptively public. Other courts have taken a different view.

We submit that the holding of the First Circuit violates the language and intent of the Federal Rules of Civil Procedure and fails to follow this Court's decision in *Seattle Times*. It creates a very serious threat to the privacy rights of litigants and other persons who are compelled to produce their private records in the discovery process. Furthermore, the holding that discovery materials are presumptively public will inevitably result in an increase in discovery disputes and protective order litigation, making the whole discovery process even more contentious than it is at present, placing additional burdens on an already overtaxed federal judiciary. In addition, the holding threatens to change radically the function and purpose of the discovery process, from assisting in the fair adjudication of litigated disputes to providing a means for individuals, businesses or special interest groups, in furtherance of their own self-interests,

to gain access to the private business and financial records of parties and non-party witnesses.

This case raises the issue squarely and clearly. It is an appropriate vehicle for this Court to exercise its supervisory powers over the lower federal courts so that the Federal Rules of Civil Procedure which govern the discovery process are interpreted and applied consistently throughout the country in a manner which protects the legitimate privacy interests of all litigants and witnesses. The Non-Party Movants based their claim to obtain private discovery materials for non-litigation purposes solely on the Federal Rules of Civil Procedure. It was conceded by all below, and acknowledged by the First Circuit, that the Non-Party Movants had no common law or First Amendment rights to this material.

Furthermore, the protective order entered by the District Court on February 25, 1985, was valid when entered. As a result of the protective order, discovery proceeded smoothly in this case, with minimal participation by the court. Eventually, the case was dismissed as a matter of law; the discovery material played no role in that decision. After the time to appeal had expired, the Non-Party Movants sought access to this discovery material, *admittedly for purposes having nothing to do with the litigation*. Nothing in the Federal Rules of Civil Procedure countenances such use of discovery material. Since the case was dismissed as a matter of law and the discovery material played no role in the dismissal, the discovery material was irrelevant to any judicial determination of the case. Nevertheless, because the First Circuit considered discovery material presumptively public, it held that plaintiffs' counsel could make the private records of Liggett and ADL available to the Non-Party Movants or anyone else to serve their private agendas. The First Circuit ruled that dismissal of the case was a change in circumstances such that the protective order which preserved the privacy interests of Liggett and ADL should be stripped away. To the contrary, the dismissal of the case on the merits without regard to the discovery material makes it more imperative that the privacy interests at stake be protected.

It is a blatant injustice that the private material of Liggett and ADL, under these circumstances, now becomes the property of plaintiffs' attorney, enabling him to give or sell it in whole or in part, in or out of context, to anyone for any use.

A. *The Decision Below Disregards the Privacy Interests of Litigants Under the Federal Rules of Civil Procedure as Interpreted by This Court in Seattle Times*

The decision of the First Circuit violates the meaning and intent of the Federal Rules of Civil Procedure and is contrary to the ruling of this Court in *Seattle Times*. Rule 1 of the Federal Rules of Civil Procedure expressly provides that their purpose is to "secure the just, speedy, and inexpensive determination of every action." In *Seattle Times*, this Court ruled that

> [l]iberal discovery is provided for the *sole* purpose of assisting in the preparation and trial, or the settlement, of litigated disputes. Because of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c). It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse. This abuse is not limited to matters of delay and expense; *discovery also may seriously implicate privacy interests of litigants and third parties.* The Rules do not distinguish between public and private information. Nor do they apply only to parties to the litigation, as relevant information in the hands of third parties may be subject to discovery.
>
> There is an opportunity, therefore, for litigants to obtain – incidentally or purposefully – information that not only is irrelevant but if publicly released could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes. Cf. *Herbert* v. *Lando*, 441 U.S. 153, 176-177 (1979); *Gumbel* v. *Pitkin*, 124 U.S. 131, 145-146 (1888). As stated by Judge

> Friendly in *International Products Corp.* v. *Koons*, 325 F. 2d 403, 407-408 (CA2 1963), "[w]hether or not the Rule itself authorizes [a particular protective order] . . . we have no question as to the court's jurisdiction to do this under the inherent 'equitable powers of courts of law over their own process, to prevent abuses, oppression, and injustices' " (citing *Gumbel* v. *Pitkin*, *supra*). The prevention of the abuse that can attend the coerced production of information under a State's discovery rule is *sufficient justification for the authorization of protective orders.*

Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34-36 (1984) (emphasis added, footnotes omitted).

The First Circuit simply ignored one of the basic tenets of *Seattle Times*: liberal discovery is provided by the Federal Rules for the *sole* purpose of prosecuting and defending a federal lawsuit. This fundamental principle cannot be squared with the holding and result reached by the First Circuit. Any use of discovery material outside the sole purpose for which it was produced is not presumptively or implicitly authorized by Rule 26(c), which was designed to protect the privacy of litigants and third-party witnesses. The intended non-litigation use of the discovery material by the Non-Party Movants is precisely the kind of abuse of the Federal Rules of Civil Procedure which this Court said Rule 26(c) was designed to prevent. Those who receive it are free to use the formerly protected material "to annoy, embarrass and oppress" Liggett, and it is obvious that the Non-Party Movants intend to use this material, if at all possible, to that purpose as well.[3]

While acknowledging that this Court's decision in *Seattle Times* "must serve as the background for any claimed right of

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[3] Disregarding this good cause for the continuation of the protective order, the First Circuit discussed only the impact of the protective order on a fair trial. In this regard, the First Circuit ignored the fact that Liggett is presently a defendant in many other cases involving claims for damages due to smoking across the country, including two in the United States District Court for the District of Massachusetts. *Baker v. Liggett Group Inc.*, C.A. No. 86-1326-W (D. Mass.); *Kotler v. American Tobacco Co.*, C.A. No. 86-0810-S (D. Mass.)

access to discovery materials" [A-23], the First Circuit first chose to disregard what it termed "expansive language" in *Seattle Times* and then tried to distinguish it on the ground that the case concerned only the application of the First Amendment to access to discovery materials, not the application of the Federal Rules of Civil Procedure. [A-24].

But this Court not only ruled in *Seattle Times* that protective orders issued on good cause are not subject to heightened First Amendment scrutiny; it also ruled on when protective orders are properly issued under Rule 26(c).[4] Under that ruling, the February 25 Protective Order should not have been disturbed.

The only post-*Seattle Times* case relied on by the First Circuit was *In re "Agent Orange" Product Liability Litigation*, 821 F.2d 139, 140 (2d Cir.) *cert denied sub nom. Dow Chemical Co. v. Ryan*, 108 S. Ct. 344 (1987), where the Second Circuit ruled that under the Federal Rules of Civil Procedure discovery material is presumptively public. For the reasons stated above, this holding by the Second Circuit also violates the Federal Rules and *Seattle Times*. *Agent Orange*, however, was a much different case than this one. There, a class action had been settled, and putative members of the class, among others, wanted to obtain discovery material ostensibly in connection with the settlement. Thus, it could be argued that the discovery material was sought in connection with the litigation.

In *Agent Orange*, the Second Circuit relied in part for its holding on the fact that the discovery material at issue had been ordered filed by the District Court, pursuant to Rule 5(d) of the Federal Rules of Civil Procedure, before the order allowing its dissemination was issued. That was not the case here. The discovery material had never been filed, and the First Circuit held that the District Court no longer had the power to order

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[4] While the case arose from the State of Washington, the Washington Rules of Civil Procedure were based on the Federal Rules. The holding in *Seattle Times* applies directly to the Federal Rules.

its filing post-judgment. Thus, Rule 5(d) has no application to this case. In any event, Rule 5(d) is an administrative, housekeeping rule that cannot displace the principles that discovery is solely for the litigation at hand and that parties and witnesses are entitled to protection of their privacy.

Furthermore, if material is ordered filed under Rule 5(d), a party is at least on notice that it may become publicly available and has the opportunity to obtain a protective order. Under the First Circuit's view that Rule 26(c) makes all discovery material presumptively public, the material can be disseminated without notice, after which it will be too late to prevent the invasion of privacy.

The decisions of the First and Second Circuits not only do violence to the Federal Rules and *Seattle Times*, they also seriously undermine the right to privacy, which has always been a cornerstone of American democracy. As Justice Brandeis, dissenting in *Olmstead v. United States*, 277 U.S. 438, 478 (1928), said:

> [The makers of our constitution] conferred, as against the Government, the right to be let alone — the most comprehensive of rights and the right most valued by civilized men.

Seattle Times is not the only case where this Court has recognized that considerations of privacy have always been present during the discovery phase of a litigation. Chief Justice Burger summarized the situation when he observed that

> [i]t has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial interrogatories were other than wholly private to the litigants.

Gannett Co. v. DePasquale, 443 U.S. 368, 396 (1979) (Burger, C.J., concurring).

An earlier decision of the Second Circuit stressed that discovery is for use in preparation for trial and "not to educate

or titillate the public." *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982), *cert. denied sub nom. Citytrust v. Joy*, 460 U.S. 1051 (1983). The Sixth Circuit has referred to the "presumptively non-public fruits of civil discovery." *Courier-Journal v. Marshall*, 828 F.2d 361, 367 (6th Cir. 1987).

Finally, a different panel of the First Circuit, in *F.T.C. v. Standard Financial Management Corp.*, 830 F. 2d 404 (1st Cir. 1987), clearly distinguished between documents which played a role in the adjudication of the case, to which the public has access, and materials "used only in discovery" which "lie beyond reach." *Id.* at 408.

We submit it is essential that this Court give guidance to the lower federal courts in the proper application of the Federal Rules and *Seattle Times* on this very important issue so that the right to privacy of litigants and non-party witnesses throughout the country are protected.

B. *If the Decision Below Is Allowed to Stand, the Federal Courts Will Be Burdened with a Substantial Increase in Discovery Disputes and Protective Order Litigation*

The decision of the First Circuit, unless reversed and the principles of *Seattle Times* reaffirmed, will inevitably result in an increase in litigation over protective orders, litigation resisting discovery, and attempts by third parties to intervene in existing and even concluded litigation to gain access to discovery material for non-litigation purposes. This is not a theoretical parade of horribles. It is actually happening, and will increase unless this Court exercises its supervisory powers to give clear guidance to the lower courts with respect to the application of *Seattle Times* to the discovery process.

A casual glance at the cases cited in the decision below, in this brief and collected in *Mokhiber v. Davis*, 537 A.2d 1100 (D.C. 1988), demonstrates how often parties have been compelled to defend their privacy interests against claims of public access to discovery materials. If the First Circuit is correct that the good cause requirement of Rule 26(c) makes discovery material presumptively public in the absence of a

protective order, private business or personal records produced in discovery can be disseminated without limitation immediately upon production. The only way a party or non-party witness can protect the privacy of its records is to resist discovery altogether or seek a protective order before the material is produced. Thus, in every case where a party or non-party witness does not want its private records widely disseminated it must seek a protective order as a matter of course before providing any material.

According to the First Circuit, parties or witnesses seeking protective orders would have to show on a document-by-document basis that they should be protected as trade secrets or the equivalent. [A-29]. Thus, Rule 26(c) would be of little help to litigants and witnesses who want to protect the privacy of business or personal records which do not rise to the level of trade secrets but which still should remain private. Individuals, businesses and organizations in this country are entitled to conduct their affairs in private as they see fit. If they become embroiled in litigation, it is not considered undue interference with their privacy if they are compelled to produce private business and personal records for the purpose of reaching a just determination of the action. It *is* an undue interference with the privacy of litigants and witnesses if their private records become the property of total strangers, who would otherwise never even see such information, but who can now use or abuse it for any purpose.

The First Circuit's reading of Rule 26(c) would eliminate the ability of parties and witnesses to protect the privacy of business and personal records, notwithstanding the clear language of this Court in *Seattle Times* that Rule 26(c) was designed to protect the privacy interests of parties and witnesses from exactly the kind of abuse Liggett now faces. Under the decision below, parties could use the threat of disclosure of discovery material as a club to bludgeon settlements, *see Joy v. North*, *supra*, or to dissuade plaintiffs from bringing meritorious actions as recognized by this Court in *Seattle Times*. 467 U.S. at 36 n. 22.

Furthermore, not only would the First Circuit's decision result in greatly increased disputes over production of material and

protective orders, its document-by-document approach would require judges and magistrates to review a sea of documents to determine whether they were trade secrets or their equivalent. Precisely to avoid such burdens, courts have approved umbrella protective orders to facilitate discovery. *See, e.g., In re Consumers Power Co. Securities Litigation*, 109 F.R.D. 45, 54-55 (E.D. Mich. 1985); *Chambers Development Co., Inc. v. Browning-Ferris Industries*, 104 F.R.D. 133, 135 (W.D. Pa. 1985); *In re Korean Air Lines Disaster of September 1, 1983*, 597 F. Supp. 621, 622-23 (D.D.C. 1984); *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 529 F. Supp. 866 (E.D. Pa. 1981). *See also Quinter v. Volkswagen of America*, 676 F.2d 969 (3d Cir. 1982).

In addition, the First Circuit's decision that the Federal Rules provide non-parties with a substantive right to private discovery material will encourage more intervention, or even the filing of lawsuits, by all kinds of special interest groups, all claiming to act for the "public interest," to exploit the discovery process in order to advance whatever ends they happen to be championing at any particular time.[5] Apparently, the privacy of parties and witnesses can be violated whenever a party or intervenor can convince a court that the case involves a matter of "public interest," an extremely vague standard of little substantive content which will embroil the courts in endless litigation and which has nothing to do with the sole purpose of discovery: to prepare a case for trial. The First Circuit has authorized precisely the abuse of the discovery process which this Court in *Seattle Times* held Rule 26(c) was supposed to prevent.

In this case alone, six non-party organizations have sought access to discovery material for purposes totally unrelated to the litigation, Dow Jones and the Non-Party Movants here. Attempts by non-parties to invade the privacy rights of Liggett and ADL resulted in several motions before the District Court and an appeal to the First Circuit. This hardly promotes the just, speedy, and inexpensive determination of litigation.

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[5] A different panel of the First Circuit was concerned about the time-consuming and expensive nature of this type of dispute which excessively disrupts the litigation process. *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986).

This Court can put an end to this vexatious litigation and its attendant burdens on an already overtaxed federal judiciary by simply reaffirming the principles of *Seattle Times* and giving clear directions to lower courts to follow them.

CONCLUSION

For the reasons set forth above, petitioners respectfully pray that a writ of certiorari be granted to review the opinion of the Court of Appeals for the First Circuit.

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Respectfully submitted,

DONALD J. COHN
(Counsel of Record)
WEBSTER & SHEFFIELD
237 Park Avenue
New York, NY 10017
(212) 808-6000

Of Counsel:
LAWRENCE D. GERZOG

JOSIAH S. MURRAY, III
LIGGETT GROUP INC.
300 North Duke Street
Durham, North Carolina 27702
(919) 683-9000

SAMUEL ADAMS
WARNER & STACKPOLE
75 State Street
Boston, Massachusetts 02109
(617) 951-9000

Of Counsel:
JOSEPH J. LEGHORN

Attorneys for Petitioners